NOV 19 2003

No. 02-1580

IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*,
Appellants,

v.

ROBERT C. JUBELIRER and JOHN M. PERZEL, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

APPELLANTS' REPLY BRIEF

ROBERT B. HOFFMAN
REED SMITH LLP
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042

PAUL M. SMITH
Counsel of Record
THOMAS J. PERRELLI
BRUCE V. SPIVA
SAM HIRSCH
DANIEL MACH
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Appellants

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

I. Appellees Vastly Understate the Significance of Partisanship in Redistricting 2

II. Appellants Belong to an "Identifiable Political Group" 3

III. Appellants' Proposed Standard Avoids the Twin Dangers of "Proportional Representation" and Judicial Unmanageability 4

A. Majority Rule, Unlike "Proportional Representation," Is Grounded in the Constitution 5

B. Appellants Have Proposed a Workable Standard for Singling out the Most Severe, Majority-Thwarting Partisan Gerrymanders 8

C. Appellees' Specific Critiques of This Standard Are Baseless 13

IV. Appellants' Article I Argument Flows Directly from *Wesberry* and Its Progeny 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Baker v. Carr, 369 U.S. 186 (1962) 1, 6-7

Balderas v. Texas, 536 U.S. 919 (2002) 14

Bandemer v. Davis, 603 F. Supp. 1479 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986) 4

Cook v. Gralike, 531 U.S. 510 (2001) 20

Davis v. Bandemer, 478 U.S. 109 (1986) ..... *passim*

Easley v. Cromartie, 532 U.S. 234 (2001) 4

Georgia v. Ashcroft, 123 S. Ct. 2498 (2003) 18

Holder v. Hall, 512 U.S. 874 (1994) 5

Karcher v. Daggett, 462 U.S. 725 (1983) 19

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 19

Miller v. Johnson, 515 U.S. 900 (1995) 8

Page v. Bartels, 144 F. Supp. 2d 346 (D.N.J. 2001) 18

Reynolds v. Sims, 377 U.S. 533 (1964) 1, 6-7

Robertson v. Bartels, 148 F. Supp. 2d 443 (D.N.J. 2001), *summarily aff'd*, 534 U.S. 1110 (2002) 18

Shaw v. Reno, 509 U.S. 630 (1993) 8, 18

Wells v. Rockefeller, 394 U.S. 542 (1969) 19

Wesberry v. Sanders, 376 U.S. 1 (1964) ..... *passim*

White v. Weiser, 412 U.S. 783 (1973) 19

CONSTITUTION

U.S. Const. art. I, § 2, cl. 1 18-20

U.S. Const. art. I, § 2, cl. 3 10

U.S. Const. art. I, § 4, cl. 1 18-20

U.S. Const. amend. I 4

U.S. Const. amend. XIV 4

MISCELLANEOUS

American Political Science Association Standing Committee on Civic Education and Engagement, *Report of the Working Group on Electoral Processes* (Aug. 2003), *available at* http://archive.allacademic.com/publication/search.php *or* http://www.apsanet.org 2

Charles Backstrom, Leonard Robins & Scott Eller, *Establishing a Statewide Electoral Effects Baseline* in *Political Gerrymandering and the Courts* (Bernard Grofman ed., 1990) 11

Tyler Bridges, *Remap Key to GOP's Victory*, Miami Herald, Dec. 1, 2002 15

CQ's Politics in America 2004 (David Hawkings & Brian Nutting eds., 2003). 4

Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* (1968) 6

John Hart Ely, *Democracy and Distrust* (1980) 6

2003 Pennsylvania Judicial Elections, *available at* http://www.fairvote.org/penn/judicial.htm 17

Appellees cannot point to a single set of factual circumstances – past or present, real or hypothetical – in which plaintiffs could bring a successful partisan-gerrymandering claim under their reading of the Federal Constitution. Their position, like that of the court below, is tantamount to overruling *Davis v. Bandemer*, 478 U.S. 109 (1986), and once again making partisan gerrymandering nonjusticiable.

But recent events – from Pennsylvania's congressional redistricting in 2002 to the unprecedented mid-decade "re-redistricting" of Texas and Colorado – show that a "hands off" approach invites gerrymandering so severe that it threatens our fundamental constitutional principle of majority rule. As the line-drawers have become more brazen in their willingness to instill bias in electoral maps, the need for judicial intervention has become compellingly clear.

Forty years ago, in *Baker v. Carr*, 369 U.S. 186 (1962), *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that malapportioned districts thwarted majority rule, that normal political processes could not solve the problem, and that federal judicial intervention was therefore proper. Today, partisan gerrymandering plays the same corrupting role in our political system – and calls for the same solution.

Appellees fail to rebut that basic point, legally or factually, and have no response to Appellants' proposed standard, other than to mischaracterize it. Appellants have proposed a standard that is narrowly tailored to allow federal courts to identify and invalidate the most egregious gerrymanders, while otherwise leaving the inherently political task of redistricting to the States.

I. Appellees Vastly Understate the Significance of Partisanship in Redistricting.

Appellees attempt to portray a political system so fluid that partisan affiliation matters little to politicians and even less to voters. That description defies contemporary American reality, *see* Appellants' Br. at 3-11; Grofman-Jacobson *Amicus* Br. at 2-15, and cannot be squared with the unprecedented efforts that parties now devote to redistricting.

Less than three months ago, the American Political Science Association (APSA) issued its new "Report of the Working Group on Electoral Processes," which identifies redistricting as a major cause of partisan polarization, lack of political competition, and low turnout:

> One of the least disputed facts about recent American politics is that both major political parties have used increasingly sophisticated information technology to protect incumbents during the decennial redistricting process. The result is a surge over the past two decades in the number of safe seats dominated by one party or the other.[1]

The APSA's report recommends that "the U.S. Supreme Court make[] it easier to find political gerrymandering" by reaffirming the justiciability of partisan-gerrymandering claims and then enunciating a new standard allowing "individuals or parties to successfully challenge a districting plan on the basis of partisan fairness."[2]

---

[1] APSA Standing Committee on Civic Education and Engagement, *Report of the Working Group on Electoral Processes* 8-9 (Aug. 2003), *available at* http://archive.allacademic.com/publication/search.php *or* http://www.apsanet.org (2003 Meeting Papers PROceedings).

[2] *Id.* at 17.

II. Appellants Belong to an "Identifiable Political Group."

The *Bandemer* plurality required plaintiffs to show "intentional discrimination against an *identifiable political group* and an actual discriminatory effect on that group." 478 U.S. at 127 (emphasis added). Appellants alleged that they were Pennsylvania citizens who usually vote for Democratic congressional candidates over Republican ones. J.S. App. 128a-129a. The District Court correctly held that this met the "identifiable political group" requirement because the group's "geographical distribution is sufficiently ascertainable" to permit gerrymandering. J.S. App. 32a. But Appellees, seeking affirmance on an alternative ground rejected below, claim they cannot identify the "[u]ndefined 'Democratic voters'" whose constitutional rights are at stake here. Jubelirer Br. at 5-6; *see also id.* at 11-15, 18-20, 31-35.

Appellees first assert that Appellants do not belong to an identifiable political group because a preference for Democratic congressional candidates is not an "observable characteristic" and hence Democratic voters are not "objectively identifiable." *Id.* at 6, 15, 36. That claim cannot be taken seriously. Two years ago, when Senator Jubelirer and his colleagues were crafting this gerrymander, they had little trouble locating their targets. They split 29 counties and 81 municipalities, surgically excising pockets of Democratic voters and then packing them into the minimum number of districts, so that the remaining districts would all be safely Republican. It ill behooves these legislators, having orchestrated such a scheme, to come to this Court feigning confusion about the makeup of the mysterious class of "Democratic voters" and denying that their intended victims are "identifiable." The menagerie of creatures suggested by this map – the "supine seahorse," the "upside-down Chinese dragon," etc. – owes its very existence to Appellees' well-honed ability to find and target

those "Democratic voters" whom Appellees now claim are so elusive.[3]

Appellees next argue that supporting Democratic congressional candidates at the polls cannot convert a group of voters into an "identifiable political group" because partisan preference, unlike race, is "highly mutable." Jubelirer Br. at 15; *see id.* at 36. But this argument proves too much: If, under *Bandemer*, partisan gerrymandering is justiciable, then "immutability" simply cannot be the touchstone for "identifiable political group" status. *See Bandemer*, 478 U.S. at 125. More generally, under the First and Fourteenth Amendments, discrimination based on "highly mutable" characteristics like partisan affiliation and political viewpoint is subject to strict scrutiny. *See* Appellants' Br. at 23-25; ACLU *Amicus* Br. at 20-22.

III. Appellants' Proposed Standard Avoids the Twin Dangers of "Proportional Representation" and Judicial Unmanageability.

What is most striking about Appellees' briefs is that they propose *no* meaningful alternative test or standard to be applied in partisan-gerrymandering cases. Rather, they spend their briefs trying to attack Appellants' proposed standard, generally by mischaracterizing it as a demand for

---

[3] Appellees' suggestion that party *registration* is the only "objectively identifiable" indicia of partisan affiliation, Jubelirer Br. at 6, is meritless. As the Cortés Appellees concede, Pennsylvania election results often "do not reflect registration figures." Cortés Br. at 6; *see also Easley v. Cromartie*, 532 U.S. 234, 244-45 (2001). Furthermore, 22 States do not even allow voters to register by party. *See CQ's Politics in America 2004 passim* (David Hawkings & Brian Nutting eds., 2003). So a test applicable only to a political party's *registrants* – rather than its actual voters – could not be applied nationwide. *See generally Bandemer v. Davis*, 603 F. Supp. 1479, 1492 (S.D. Ind. 1984) (three-judge court) (finding "Democratic voters" to be a "politically salient class"), *rev'd on other grounds*, 478 U.S. 109 (1986).

"proportional representation" or as judicially unmanageable. Those attacks are baseless.

A. Majority Rule, Unlike "Proportional Representation," Is Grounded in the Constitution.

Appellees' principal tack is repeatedly to mischaracterize this appeal as a demand for "proportional representation." Cortés Br. at 10, 15-16, 22-25; Jubelirer Br. at 30-31, 47. That is a straw man.

Appellants defend the constitutional principle of majority rule, not the extra-constitutional policy of proportional representation. In America, no political, racial, or socioeconomic group has a constitutional right to proportional representation. *See Bandemer*, 478 U.S. at 130-32 (plurality opinion). But the Constitution does prohibit gerrymanders that are so severe that they frustrate majority rule.

Wielding the force of their ideas and the character of their candidates, political parties compete for majority support in the electorate. Any party that earns a majority of the vote should have at least a fighting chance to become the governing party, with a majority of seats. Redistricting plans that repeatedly invert voting minorities into governing majorities are unconstitutional because they thwart the will of the majority. The "'essence of our republican arrangement'" is that voting minorities lose and voting majorities win. *Holder v. Hall*, 512 U.S. 874, 901 n.10 (1994) (Thomas, J., concurring in the judgment) (citation omitted). If a popular majority has no realistic prospect of converting its strength at the polls into political power, then our system does not deserve to be called either a "democracy" or a "Republican Form of Government."

This Court has a long history of defending the constitutional principle of majoritarianism in the context of

redistricting. In the early 1960s, malapportionment in many States allowed fewer than 40% of the voters (usually from rural regions) to control an outright majority of seats. *See generally* Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* 589-628 (1968). The seminal one-person, one-vote cases – *Baker v. Carr*, *Wesberry v. Sanders*, and *Reynolds v. Sims* – all stand for the proposition that the normal political processes could not be relied on to protect the voting rights of the majority against redistricting abuses. Judicial review was needed because "our elected representatives . . . have an obvious vested interest in the status quo." John Hart Ely, *Democracy and Distrust* 117 (1980).

Even Appellees must concede that judicial intervention was warranted in the one-person, one-vote cases, because malapportionment presented "a self-perpetuating breakdown of the political process itself." Cortés Br. at 20. But the same can be said for partisan gerrymandering today. In Pennsylvania and a handful of other States where one party has abused its control of the redistricting process, "the majority of the people" have been left with "no practical opportunities for exerting their political weight at the polls to correct the existing invidious discrimination. . . . The majority of voters have been caught up in a legislative straight jacket." *Baker v. Carr*, 369 U.S. at 258-59 (Clark, J., concurring).

In *Bandemer*, the Court extended the logic of *Baker v. Carr* to make partisan-gerrymandering claims justiciable: "[O]ur general majoritarian ethic and the objective of fair and adequate representation recognized in *Reynolds v. Sims*" prohibit districting plans that "consign[majorities] to minority status." *Bandemer*, 478 U.S. at 126 n.9 (citing *Reynolds*, 377 U.S. 533, and *Baker*, 369 U.S. at 217). But the lower courts have effectively nullified that holding,

leaving majoritarianism unprotected. *See* Appellants' Br. at 3-4 (citing J.S. App. 39a).

The risk that gerrymandering poses to majority rule and democratic accountability multiplies further when redistricting becomes a *biennial* process, as it now threatens to do in Texas and Colorado. With biennial redistricting, partisans need look ahead only one election cycle, rather than five. If an unanticipated popular trend emerges in the next election, they can fine-tune their gerrymander before the following election and thus stay one step ahead of the voters.

Appellees' proposed regime – prohibiting malapportionment that thwarts majority rule while permitting gerrymanders (even biennial gerrymanders) that inflict similar harms – works about as well as half a pair of pliers. This case presents the opportunity to complete the unfinished business that began with *Baker*, *Reynolds*, and *Wesberry*.

To see why vindicating this constitutional principle of majoritarianism does not demand proportional representation, it may be helpful to examine a hypothetical example where a perfectly lawful map can generate a disproportionate outcome. Imagine a State with five districts that are 46, 48, 50, 52, and 54 percent Republican, respectively, in an average election where the parties are evenly divided statewide. If, in a given year, Republican candidates run strong campaigns and thereby attract additional support from the electorate, they could receive 55 percent of the vote statewide, yet walk off with 100 percent of the seats, while Democrats (with 45 percent of the vote) would win nothing. Although far from proportional representation, this result is fully compatible with majoritarianism. The map should be upheld, as it presents no threat to majority rule. Rather, the disproportionality between votes and seats comes from the traditional "seats bonus" that stronger parties routinely earn under winner-take-all, district-based electoral systems. *See*

Bandemer, 478 U.S. at 130 (plurality opinion). Where, as in this hypothetical, many districts are competitive, stronger parties typically get supra-proportional representation and weaker parties get sub-proportional representation. There is nothing unconstitutional about that.

B. Appellants Have Proposed a Workable Standard for Singling out the Most Severe, Majority-Thwarting Partisan Gerrymanders.

Given Appellees' frequent misstatements, it seems useful to restate exactly what standard Appellants propose. The standard flows directly from the constitutional principle it is designed to vindicate: majority rule. *See Bandemer*, 478 U.S. at 126 n.9. It requires a clear showing that a redistricting plan was intentionally designed to hand one party a majority of seats whether or not that party's candidates earn majority support from the voters.

More specifically, it requires plaintiffs to satisfy an "intent" element and an "effects" element. *See* Appellants' Br. at 30-48. Under the intent element, plaintiffs must show, by either direct or circumstantial evidence, that achieving partisan advantage was the predominant motivation behind the statewide redistricting plan. *See id.* at 31-33, 41-43, 45. The inquiry here is no different in principle from the analysis of line-drawers' predominant intent in cases where plaintiffs allege either intentional dilution of minority voting strength or racial gerrymandering. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

Under the effects element, plaintiffs must show that the plan (1) systematically "packs" and "cracks" one party's voters, and (2) would consistently prevent that party from winning a majority of seats even if its candidates repeatedly earned a narrow majority of votes statewide. *See* Appellants' Br. at 33-41, 43-48. The effects element that Appellants propose has two chief benefits. First, because it

is extremely hard – but not impossible – for plaintiffs to satisfy, it will distinguish the truly egregious gerrymanders from the everyday use of partisanship in redistricting. Second, the standard flows directly from, and is tightly tethered to, the constitutional value at stake here – majority rule.

Appellants have also described one way in which experts and courts could go about establishing the requisite effects. Although we do not claim it is the only constitutionally acceptable methodology, it is useful to show that there is at least one manageable approach to the problem. A review of that methodology further demonstrates its tight linkage to the goal of preserving majority rule.

Step One. The first step in assessing whether an alleged gerrymander systematically packs and cracks one party's voters is to identify the body of relevant elections. In a challenge to a congressional map, the focus ordinarily should be on the entire set of *statewide* general elections (for offices such as President, U.S. Senator, Governor, and so forth) that appeared on the ballot with congressional elections in the last decade. Those are the data used by consultants who design gerrymanders and by political scientists who evaluate them – including the experts for both Appellants and Appellees. *See* JA 32-45, 218-19. A statewide election is particularly revealing because the same Republican candidate and the same Democratic candidate square off in every precinct in the State. And their vote totals cannot be affected by gerrymandering, because they run at large.[4] Furthermore, reaching back a full decade

---

[4] One might think that the best evidence of a party's voting strength would come from congressional elections held under the challenged map. But that approach is problematic, for three reasons. First, it would require that even the most severe gerrymander be used for an election

continued

makes sense because it captures a large sample of statewide contests and because ten years is the period that the Framers established for congressional reapportionment and redistricting. *See* U.S. Const. art. I, § 2, cl. 3. Pennsylvania had 18 such elections in the decade preceding redistricting; and Appellants' expert, Professor Lichtman, presented evidence that these 18 statewide elections were excellent predictors of congressional-election outcomes. *See* JA 32-45, 269-71.

Step Two. The second step in checking for systematic packing and cracking is to compute, for each statewide election from the last decade, how the candidates performed in each district under the challenged map. For any given district in any given plan, one can easily calculate accurate vote totals by simply adding up the votes each statewide candidate received in the precincts that fall within the district. *See* JA 273-76. For example, in Pennsylvania's November 2000 general elections, the closest statewide election was the contest for State Treasurer, in which Republican incumbent Barbara Hafer narrowly defeated Democratic challenger Catherine Baker Knoll. J.S. App. 138a. Plugging the precinct-by-precinct vote totals for that election into the challenged district map enacted a year later reveals that Hafer's district-level returns varied from 15.02% of the vote in District 2 to 67.84% of the vote in District 19. JA 274.

Step Three. The third step is to "normalize" each statewide election to simulate a 50-50 contest and then to

---

cycle or two before it could be challenged. Second, even when available, these results can be misleading because they are tainted by the gerrymander itself (as will be shown below, as to Pennsylvania's 2002 congressional returns). JA 33-34. Third, using congressional returns – whether from elections held under the challenged map or under its predecessor – requires "apples and oranges" comparisons of districts with no incumbents, districts with strong challengers, districts with weak challengers, and districts where incumbents ran unopposed. *Id.*

add up the number of seats that each candidate would have won. A 50-50 election (where the two candidates are effectively "tied" statewide) is the litmus test for determining whether a party's majority share of the seats flows from disparate packing and cracking of the rival party's voters, as opposed to the legitimate "seats bonus" that winner-take-all, district-based systems typically generate. *See supra* pages 7-8. At 50-50, neither party gets the bonus that comes from being the more popular party. And at 50-50, each party should have at least a fighting chance of winning half or more of the seats.[5] When the two parties are effectively "tied" statewide, a redistricting plan intentionally crafted to consistently reward one party with far more seats than the other offends our Constitution's "general majoritarian ethic." *Bandemer*, 478 U.S. at 126 n.9.

In Pennsylvania's 2000 Treasurer's contest, on average (across the 19 congressional districts), the Republican Hafer got 50.78% of the major-party vote and her Democratic opponent, Knoll, got 49.22%. So to simulate a 50-50 contest, one can "normalize" the results by adding 0.78% to Knoll's percentage and subtracting 0.78% from Hafer's percentage in each district. That simulates what would have happened in a "tied" election. Here, the Republican candidate (Hafer) would have carried 12 of the 19 congressional districts under the challenged map, while the Democrat (Knoll) would have carried only 7 districts. That disparity reflects the extraordinary degree to which the voters who could have formed a Democratic majority for Knoll were "packed" into 7 districts and "cracked" among the remaining 12.

---

[5] *See* Charles Backstrom, Leonard Robins & Scott Eller, *Establishing a Statewide Electoral Effects Baseline* in *Political Gerrymandering and the Courts* 145, 159-65 (Bernard Grofman ed., 1990).

Step Four. The next step is to apply Steps Two and Three to all the other statewide elections identified in Step One, to check for a *systematic pattern* of packing and cracking. In each statewide contest, "'issues, candidates, personalities, unusual party effort, and other contingent factors,'" Cortés Br. at 23-24 (citation omitted), generate a slightly different geographic, or spatial, distribution of Republican and Democratic voting strength. But a severe, majority-thwarting gerrymander will be effective under almost *any* of these distributions.

The vast bulk of redistricting plans will not exhibit *systematic* packing and cracking; once normalized to 50-50, some statewide elections will show a slight Republican tilt, and others will show a slight Democratic one. But for Pennsylvania's 18 relevant elections, each of which was "normalized" to simulate a statewide "tie," Appellants' expert, Professor Lichtman, found a stark pattern: With half the votes, Republican candidates would have carried between 11 and 14 districts in every contest, with no exceptions, while Democratic candidates would have carried only 5 to 8 districts. *See* Appellants' Br. at 46-47 & n.34. Appellees cannot point to a *single* recent statewide contest contradicting this pattern of disparate packing and cracking.

Step Five. The fifth and final step is to appraise the "totality of circumstances" that might bear on the issue of partisan gerrymandering. Here, the inquiry turns to other factors – such as the treatment of each party's incumbents – that can aggravate or mitigate the anti-majoritarian effects of disparate packing and cracking. *See* Appellants' Br. at 36-37, 40-41, 47-48.

As noted, there may be other ways to distinguish between the appropriate use of politics in redistricting and the excessive use that consistently frustrates majority rule. But under any reasonable standard, the allegations in this case – that the Pennsylvania General Assembly abandoned

every neutral redistricting principle in a single-minded effort to entrench one party's control over a supermajority of seats – must survive a motion to dismiss.

C. Appellees' Specific Critiques of This Standard Are Baseless.

Appellees toss out a long series of criticisms of this proposed legal standard, again without proposing a meaningful alternative. Their critiques are misplaced.

First, Appellees incorrectly assume that the test would apply only to closely divided States like Pennsylvania, where elections actually approach the 50-50 mark. *See* Cortés Br. at 24-25; *see also* Jubelirer Br. at 2, 5 & n.11, 23 & n.21. In fact, the test applies to any redistricting plan and seeks to ascertain whether one party would be denied a majority of seats *if* it received a narrow majority of votes statewide. One can never know for sure which party will earn majority support in some *future* electorate, but a redistricting plan should not foreclose *either* party from capturing a majority of seats if it eventually earns a majority of votes. To satisfy the effects element, "plaintiffs must show that the plan needlessly undermines the democratic accountability of elected representatives to *shifting* majoritarian preferences." Appellants' Br. at 34 (emphasis added). The voting strength of the plaintiffs' political party at the time they file their complaint or try their case, *see* Jubelirer Br. at 1-3, is irrelevant.

Second, Appellees argue that the proposed standard is too "subjective." Cortés Br. at 24. But focusing on all normalized statewide elections from the prior decade provides a clear test that will generate consistent results regardless of which judge applies it or which expert witness presents the data. Furthermore, it is an extraordinarily stringent rule, yet it will accomplish its mission: to distinguish run-of-the-mill partisanship from the truly egregious examples of gerrymandering – those capable of

repeatedly inverting a voting minority into a governing majority.[6]

Third, Appellees claim that Appellants' standard requires States to "maximize competition at the district level . . . [rather than] to maximize the protection given to incumbents, with their accumulated experience and seniority." Cortés Br. at 28; *see also* Jubelirer Br. at 26-27. Appellants have made no such suggestion. The Constitution may or may not require States to create competitive districts rather than favoring the reelection of all incumbents, but what certainly lacks constitutional legitimacy is for a State intentionally to thwart majority rule by protecting one party's incumbents while targeting the other party's incumbents for defeat. Of course, that is precisely what the Pennsylvania legislature did here, as it effectively paired 5 of the 10 Democratic incumbents, but only 1 of the 11 Republican incumbents, while simultaneously drawing a map that would strongly favor the Republicans even if every incumbent retired. *See* Appellants' Br. at 13-14, 43-48.

Fourth, Appellees also mischaracterize the proposed test by suggesting that it *assumes* a tight correlation between statewide and congressional election returns. *See* Jubelirer Br. at 39. But that also is not true. Rather, plaintiffs must

---

[6] Appellees' discussion of Texas, *see* Jubelirer Br. at 44-46, not only wanders far from the facts of this case, but also displays the kind of fuzzy thinking that Appellants' proposed standard avoids. The map drawn in 2001 by the three-judge district court and summarily affirmed in *Balderas v. Texas*, 536 U.S. 919 (2002), would not come close to qualifying as a "Democratic gerrymander" under Appellants' test. The methodology described above reveals that the Texas court's map actually has a slight pro-Republican tilt, with 17 or 18 districts that would lean Republican in a 50-50 statewide contest and 14 or 15 districts that would lean Democratic. In the November 2002 elections, Democrats carried a narrow majority of congressional seats as they won all but one of the closest races under the court-drawn map.

prove the correlation, as Appellants did here. Professor Lichtman analyzed election returns in each of Pennsylvania's 9,427 precincts, for each of the last five election cycles, and found extremely high correlations between congressional and statewide results. *See* JA 38-44, 269-71; *see also* Appellants' Br. at 8 & n.12 (describing how partisan voting patterns nationwide have become more consistent from office to office and from election to election). Indeed, using statewide election results, Professor Lichtman correctly predicted 18 of last year's 19 congressional contests in Pennsylvania (the lone exception being District 17, *see* Appellants' Br. at 48 & n.35). And he also correctly predicted 15 of 15 congressional contests in Michigan and 25 of 25 in Florida, the two other States where he testified on behalf of plaintiffs raising partisan-gerrymandering claims. *See* Tyler Bridges, *Remap Key to GOP's Victory*, Miami Herald, Dec. 1, 2002, at B1. That record belies Appellees' contention that gerrymandering is "self-limiting" because electoral behavior cannot accurately be predicted. *See* Jubelirer Br. at 30, 38; Cortés Br. at 23 n.9.

Fifth, Appellees launch several attacks on the sufficiency of the evidence that Appellants presented below. In so doing, they tout the fact that Republican candidates garnered 56.2% of the votes cast for Congress in Pennsylvania in November 2002, while Democrats garnered only 41.5%. *See* Cortés Br. at 6; Jubelirer Br. at 4. The party that captured a majority of seats, they note, was also the party whose candidates won a majority of votes. As a matter of law, those figures are irrelevant because the political-gerrymandering claims in Appellants' complaint, drafted long before November 2002, were dismissed for failure to state a cognizable claim and hence Appellants had no opportunity to contest this point.

But on remand, Appellants would show that the 2002 figures are highly misleading because they fail to account for

the impact that *the gerrymander itself* had on the vote totals. *See* Appellants' Br. at 38 n.32. As the complaint makes clear, aggregating congressional votes statewide, Democrats took a narrow majority in the November 2000 elections held under the districting plan that the Pennsylvania Supreme Court had adopted in 1992. *See* J.S. App. 137a. But by the time the November 2002 general elections were held, the newly enacted gerrymander had decimated the cores of most Democratic incumbents' districts while leaving intact most of the Republican incumbents' district cores, and had caused the primary-election defeat or forced retirement of three Democratic incumbents (Congressmen Borski, Coyne, and Mascara) but no Republican incumbent.[7] So by November 2002, only 19% of all Pennsylvania voters had the opportunity to vote for a Democratic incumbent who already represented them in Congress. *See* JA 272. Given that incumbency typically provides a five- to twelve-point edge, *see* Appellants' Br. at 40, the systematic destruction of the Democrats' incumbency advantages sharply deflated the party's vote totals.

Furthermore – consistent with Appellants' prediction that gerrymandering would hurt Democratic candidate recruitment, *see* J.S. App. 141a – in five districts, Democratic prospects under the newly gerrymandered map

---

[7] Appellees disingenuously assert that a "desire to receive 'pork' may explain the curiously-shaped 12th District." Jubelirer Br. at 26 n.22. District 12 – which borders four districts, all of which are now held by Republicans – was designed to "pack" into just one district the Democratic voters who previously had formed the heart of two reasonably compact, competitive, but Democratic-leaning districts represented by Congressmen Murtha and Mascara. *See* J.S. App. 166a, JA 260 (color maps). The elimination of one of those districts and the packing of rural southwestern Pennsylvania's Democratic voters into new District 12 led to Democratic Congressman Mascara's defeat in 2002. *See* JA 51, 56, 123-28, 161-70.

were so dismal that no Democratic candidate filed for office. *See* Appellants' Br. at 38 n.32. By contrast, only one Democrat ran unopposed. The Republicans' supposed 56.2%-to-41.5% advantage in popularity was heavily inflated by this five-to-one differential in races where the vote tally was 100% to 0%.

In any event, Appellees have not denied or even responded to the most telling fact about the 2002 congressional returns: Republicans would have retained control of Pennsylvania's congressional delegation even if Democrats had done 10 points better (and Republicans had done 10 points worse) in every precinct in the State. Appellants' Br. at 49. Thus, because of the uneven playing field that the gerrymander itself created, Democrats could have had a sizable majority of the vote statewide yet carried less than half the seats.

Appellees also attack Professor Lichtman for failing to analyze the congressional districts using statewide *judicial* contests. Jubelirer Br. at 38-39. He did so principally because those elections are held in odd years, when congressional contests are not on the ballot and turnout is much lighter. *See* JA 108-09. In any event, analyzing statewide judicial elections here would only confirm the systematic packing and cracking of Democratic voters. For example, in the most recent Pennsylvania Supreme Court election, in November 2003, Democrat Max Baer captured nearly 52% of the vote, yet carried less than 32% of the congressional districts (6 out of 19).[8]

Sixth and finally, the Alabama Democratic *amici* raise the specter of "potential conflicts" between Appellants' proposed standard and minority voters' rights. Alabama

---

[8] *See* 2003 Pennsylvania Judicial Elections, *available at* http://www.fairvote.org/penn/judicial.htm.

Democrats' Br. at 4, 13. But that concern is also misplaced. In Pennsylvania, for example, Appellants presented alternative plans that lacked the extreme partisan bias of the challenged plan, paid far more respect to compactness, municipal boundaries, and other traditional districting principles, *see* Appellants' Br. at 48 – and also preserved the majority-minority districts in the Philadelphia area.

Moreover, across the Nation, the least competitive districts in general elections often are heavily minority districts that "pack" African-American or Latino voters and, in some instances, arguably violate the *Shaw* doctrine's prohibition against the excessive and unjustified use of race. Plans that reject racial segregation and enhance minority representation by "unpacking" overwhelmingly minority districts are thus more likely to reduce partisan bias by also "unpacking" Democratic voters. *See, e.g., Page v. Bartels*, 144 F. Supp. 2d 346, 348-69 (D.N.J. 2001) (three-judge court); *Robertson v. Bartels*, 148 F. Supp. 2d 443, 455-58 (D.N.J. 2001) (three-judge court), *summarily aff'd*, 534 U.S. 1110 (2002). Thus, if the standard proposed here has any significant impact on minority voters, it would likely be to *enhance* their representation. *See Georgia v. Ashcroft*, 123 S. Ct. 2498, 2511-17 (2003).

At bottom, the Alabama *amici*'s argument seems better calculated to protect the Democrats' 25-to-10 advantage in the Alabama Senate than to empower African-American voters. But under our Constitution, Democratic legislators in Alabama have no more authority to thwart majority rule than do Republican legislators in Pennsylvania.

IV. Appellants' Article I Argument Flows Directly from *Wesberry* and Its Progeny.

Appellees fundamentally misperceive Appellants' Article I claim by ignoring the relationship between Sections 2 and 4 of that Article. *See, e.g.*, Cortés Br. at 30-31. The complaint alleged that the Pennsylvania legislature exceeded

its Section 4 (Elections Clause) authority to regulate the time, place, and manner of congressional elections when it drew a redistricting plan to favor one class of candidates and to dictate electoral outcomes – because that deprived "the People of [Pennsylvania]" of their constitutional right *under Section 2* to freely elect their preferred candidates to the House of Representatives. *See* Appellants' Br. at 1, 15, 19, 25-29; J.S. App. 130a-131a, 144a. Appellees counter that only Congress, not the courts, can constrain the state legislatures' power to draw congressional districts. *See* Jubelirer Br. at 33-34 & n.28, 40-42, 42 n.32. But, if they are right, then *Wesberry v. Sanders*, 376 U.S. at 5-18, and the entire line of Article I malapportionment cases would have to be overruled.[9]

In *Wesberry*, this Court held that the 1931 statute establishing Georgia's congressional districts violated Article I because – given massive population shifts in the intervening decades – it deprived "the People of [Georgia]" of their constitutional right to cast undiluted votes for their Representatives in Congress and potentially allowed 39% of the voters to control half the State's congressional delegation. 376 U.S. at 5-18 (citing U.S. Const. art. I, §§ 2, 4). Congress could not be trusted to safeguard "the right of citizens to vote for Congressmen," so the Court stepped in. *Id.* at 6. The Court therefore interpreted Sections 2 and 4 of Article I as imposing judicially enforceable limits on congressional redistricting plans. *See id.* at 5-18. *Wesberry* and its progeny were correctly decided and should not be overruled.

---

[9] *See, e.g., Karcher v. Daggett*, 462 U.S. 725 (1983) (relying on *Wesberry* to strike down a congressional plan); *White v. Weiser*, 412 U.S. 783 (1973) (same); *Wells v. Rockefeller*, 394 U.S. 542 (1969) (same); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (same).

Finally, ignoring Appellants' reliance on Section 2, Appellees assert that the "Court has never held that a state law violated Article I, § 4 itself." Cortés Br. at 12. But even if relevant, that assertion would be flatly wrong. That is precisely what this Court did in *Cook v. Gralike*, 531 U.S. 510 (2001), when it struck down the Missouri law placing on the face of the ballot each congressional candidate's position on the issue of term limits. The Court noted that States exceed their Elections Clause authority whenever they manipulate the political process to "dictate electoral outcomes [or] favor or disfavor a class of candidates." *Id.* at 523. Contrary to Appellees' assertion, Cortés Br. at 33, the gerrymander at issue here has a similar purpose: to favor one class of candidates and thus to dictate a majority-Republican congressional delegation regardless of the preferences of most Pennsylvania voters.

CONCLUSION

The Court should reverse the judgment below and remand the case for further proceedings.

Respectfully submitted,

ROBERT B. HOFFMAN
REED SMITH LLP
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042

PAUL M. SMITH
Counsel of Record
THOMAS J. PERRELLI
BRUCE V. SPIVA
SAM HIRSCH
DANIEL MACH
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Appellants

November 19, 2003